Admission, Status, and Removability[1]

The purpose of this brief article is to review the concepts of admission, status, and removability; and review how each concept may impact removal proceedings.[2] Some removal proceedings involve a respondent who has never had legal status in the United States and who is trying to obtain legal status during the course of the removal proceedings. Other removal proceedings involve respondents who have a legal status and are trying to not lose their status or are trying to convert their status into a more permanent status in the course of removal proceedings.

Immigration Judges preside over removal proceedings on a daily basis. In each proceeding, the Immigration Judge must make a finding on the issue of removability. The issues of admission and status may impact the determination of removability, as well as the respondent's eligibility for relief.

I. Admission

The term "admission" is defined in section 101(a)(13)(A) of the Immigration and Nationality Act (INA):

> The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

Whether an individual has made an admission or been admitted will impact how he or she is charged in removal proceedings.

A. The Charge

Each removal proceeding is initiated by the Department of Homeland Security (DHS) with the filing of a charging document with the Immigration Court. With some exceptions, the charging document is called a Notice to Appear (NTA). The NTA will identify the respondent. It will indicate how the respondent is charged, under 8 CFR § 1240.8. Specifically, the NTA will indicate (in the upper left section) whether the Respondent is charged:

- As an arriving alien;
- As an alien present in the U.S. who has not been admitted or paroled; or
- As an alien who has been admitted to the U.S., but who is removable.

[1] Written and presented by Immigration Judge Maureen O'Sullivan. Thank you to Summer Moore-Estes, Attorney Advisor, for her invaluable assistance in preparing this outline.

[2] Other specialized proceedings such as credible fear and claimed status review proceedings are discussed elsewhere in this training.

Example of NTA charge:

DEPARTMENT OF HOMELAND SECURITY

NOTICE TO APPEAR

In removal proceedings under section 240 of the Immigration and Nationality Act:

File No. [redacted]

In the Matter of:

Respondent: [redacted] currently residing at:

[redacted] BELMONT, MA 02478-0000 [redacted]

(Number, street, city and ZIP code) (Area code and phone number)

- [ ] You are an arriving alien.
- [ ] You are an alien present in the United States who has not been admitted or paroled
- [x] You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that:

1) You are not a citizen or national of the United States.
2) You are a native of NEPAL and a citizen of NEPAL;
3) You were admitted to the United States at NEW YORK, NY (IA) on or about June 2, 2015 as a nonimmigrant B2 with authorization to remain in the United States for a temporary period not to exceed December 1, 2015 ;
4) You remained in the United States beyond December 1, 2015 without authorization.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237 (a) (1) (B) of the Immigration and Nationality Act (Act), as amended, in that after admission as a nonimmigrant under Section 101(a) (15) of the Act, you have remained in the United States for a time longer than permitted.

- [ ] This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
- [ ] Section 235(b)(1) order was vacated pursuant to: [ ] 8CFR 208.30 [ ] 8CFR 235(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

JFK FEDERAL BUILDING, ROOM 320, BOSTON, MA 02203-0000

(Complete Address of Immigration Court, including Room Number, if any)

on TBD *(Date)* at TBD to show why you should not be removed from the United States based on the charge(s) set forth above.

(b) (7)(C) [redacted]

(City and State)

Date 11/20/16

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B. Burden of Proof

The burden of proof depends upon which box is checked on the Notice to Appear. The regulations, 8 CFR § 1240.8, clearly explain the burden for each category of charge.

1. If charged as an arriving alien: the respondent has the burden to show they are entitled to be admitted clearly and beyond a doubt.
2. If charged as present without admission or parole, the respondent must prove lawful presence by clear and convincing evidence.
3. If charged as admitted, then DHS must prove removability by clear and convincing evidence.

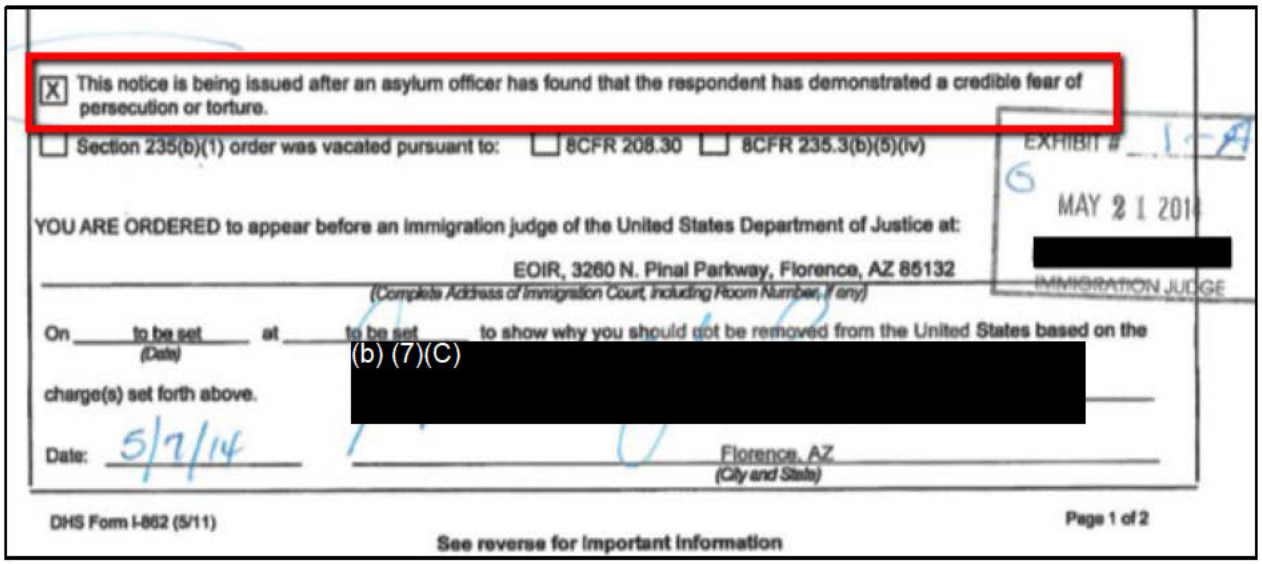
Note that the Department of Homeland Security (DHS) always has the burden to prove alienage.

C. Expedited Removal

The law allows for some applicants for admission to be removed from the United States without a hearing. This process, called expedited removal, is governed by section 235 of the Immigration and Nationality Act (INA). In short, if an immigration officer determines that an arriving alien is inadmissible under section 212(a)(6)(c) of the Immigration and Nationality Act (for misrepresentation) or section 212(a)(7) of the Immigration and Nationality Act (for lack of documents), the officer may order the individual removed UNLESS he or she intends to seek asylum.

If the individual arriving alien expresses a fear of return to their home country, they will be referred to an asylum officer for a credible fear determination. *See* INA § 235(b)(1)(A)(ii); INA § 235 (b)(1)(B). If the asylum officer finds credible fear, the case will be referred to the Immigration Court. This is also reflected in the Notice to Appear (NTA).

Example of NTA issued after credible fear interview (located on the lower section of the page):



[X] This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

[ ] Section 235(b)(1) order was vacated pursuant to: [ ] 8CFR 208.30 [ ] 8CFR 235.3(b)(5)(iv)

EXHIBIT # 1-A

MAY 2 1 201[redacted]

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

EOIR, 3260 N. Pinal Parkway, Florence, AZ 85132
(Complete Address of Immigration Court, including Room Number, if any)

IMMIGRATION JUDGE

On to be set (Date) at to be set to show why you should not be removed from the United States based on the charge(s) set forth above.

(b) (7)(C) [redacted]

Date: 5/7/14

Florence, AZ
(City and State)

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See reverse for important information

D. Admission by Waive-In

In certain situations, a respondent may be able to show admission by being "waved-in" at the border. The Board has held that this requires that the respondent prove "procedural regularity," but does not require that the border official questioned the respondent or admitted him or her in any particular status. *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010).

Two Circuits, the Fifth Circuit and Ninth Circuit, have extended this rationale to cancellation of removal for lawful permanent residents. *See* INA § 240(A)(a)(2); *Tula-Rubio v. Lynch*, 787 F.3d 288 (5th Cir. 2015); *Saldivar v. Sessions*, 877 F.3d 812 (9th Cir. 2017). These two circuits have held that being "waved-in" constitutes an admission "in any status" for purposes of the requisite seven years continuous presence for cancellation. The Board disagrees, and has held that for all cases arising outside of the Fifth Circuit and Ninth Circuit the waved-in rationale does not extend to cancellation cases. *Matter of Castillo Angulo*, 27 I&N Dec. 194 (BIA 2018).

II. Status

A. Types of immigration status, including:

1. **Permanent Residents**- Lawful permanent residents (LPR) are legal immigrants who are authorized to live and work permanently in the United States. LPRs are often informally referred to as having a "green card."
2. **Conditional Permanent Residents**-Conditional residence is granted to a person who seeks permanent residence on the basis of a marriage that is less than two years old. It is also a status granted to a person who seeks permanent residence under the employment-based fifth preference, the employment-creation category. This status is granted for two years, at the end of which the conditional resident must apply to have the condition removed to convert to full permanent residence. This status and process are described in section 216 of the Immigration and Nationality Act (INA).
3. **Nonimmigrants**-These are defined in section 101(a)(15) of the Immigration and Nationality Act. It includes a wide variety of statuses, which are all temporary and are tied to a specific purpose. Each nonimmigrant status is identified with a letter of the alphabet that corresponds to, and is defined in, section 101(a)(15) of the Immigration and Nationality Act. For example:
    - B nonimmigrants are temporary visitors for business or pleasure, as defined in section 101(a)(15)(B) of the Immigration and Nationality Act;
    - F nonimmigrants are foreign students, as defined in section 101(a)(15)(F) of the Immigration and Nationality Act;
    - H-1B nonimmigrants are workers in a specialty occupation, as defined in section 101(a)(15)(H)(1)(b) of the Immigration and Nationality Act;
    - K-1 nonimmigrants are fiancés or fiancées of U.S. citizens, as defined in section 101(a)(15)(K)(i) of the Immigration and Nationality Act;
    - K-3 nonimmigrants are the minor children of K-1 nonimmigrants (fiancés or fiancées of U.S. citizens), as defined in section 101(a)(15)(K)(iii) of the Immigration and Nationality Act.

4. **Refugees**- Are admitted to the United States under section 207 of the Immigration and Nationality Act. BEFORE entering the United States, they are found to have met the definition of refugee under section 101(a)(42) of the Immigration and Nationality Act.
5. **Asylees**- Have been granted asylum under section 208 of the Immigration and Nationality Act, either by U.S. Citizenship and Immigration Services (USCIS) or an Immigration Judge. AFTER entering the United States, they are found to have met the definition of refugee under section 101(a)(42) of the Immigration and Nationality Act as part of the asylum adjudication.
6. **Temporary Protected Status (TPS)**- A status available to people from countries designated by the Attorney General due to armed conflict, civil strife, natural disaster, etc. that prevent them from returning to their country. *See* INA § 244.

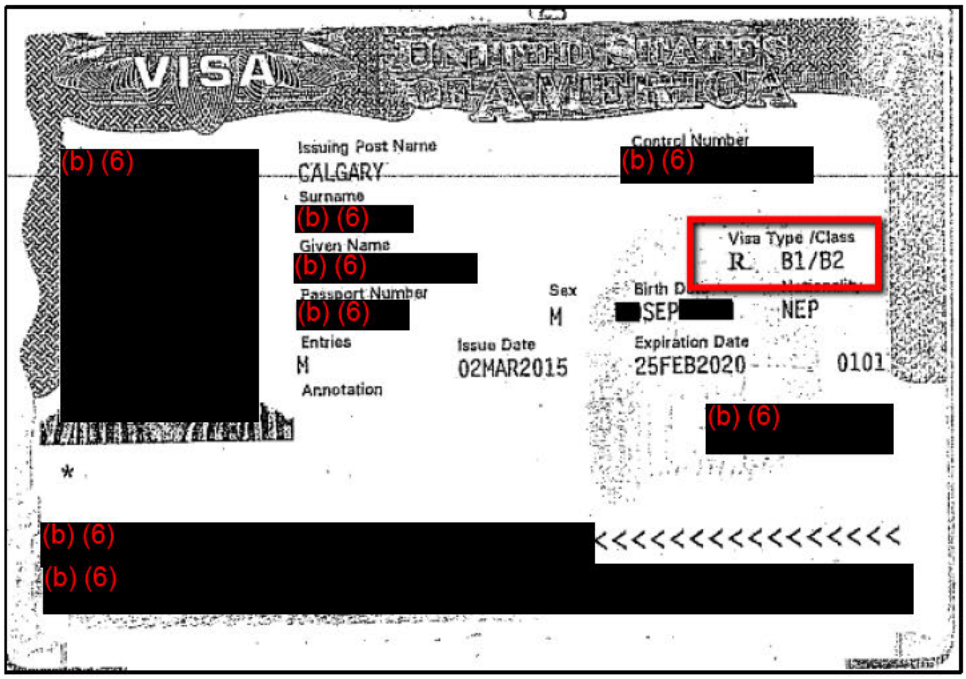
Note that an Immigration Judge does not have authority to grant nonimmigrant status or refugee status. They can grant permanent residence, conditional residence, asylum and TPS (in limited situations). However, when determining removability, Immigration Judges may have to determine whether a person is in a valid nonimmigrant or refugee status.

B. Visas

A visa is placed in a traveler's passport by a consular officer, who is an employee of the Department of State. Immigration Judges do not grant or deny visas. However, copies of visas may be presented in removal proceedings as evidence of a respondent's status.

Note that with nonimmigrants, the visa will show the letter indicating the particular status that corresponds to, and is defined in, section 101(a)(15) of the Immigration and Nationality Act. For example, a nonimmigrant visitor, defined in section 101(a)(15)(b) of the Immigration and Nationality Act will have a B visa.

Example of visa indicating B1/B2, nonimmigrant visitor:

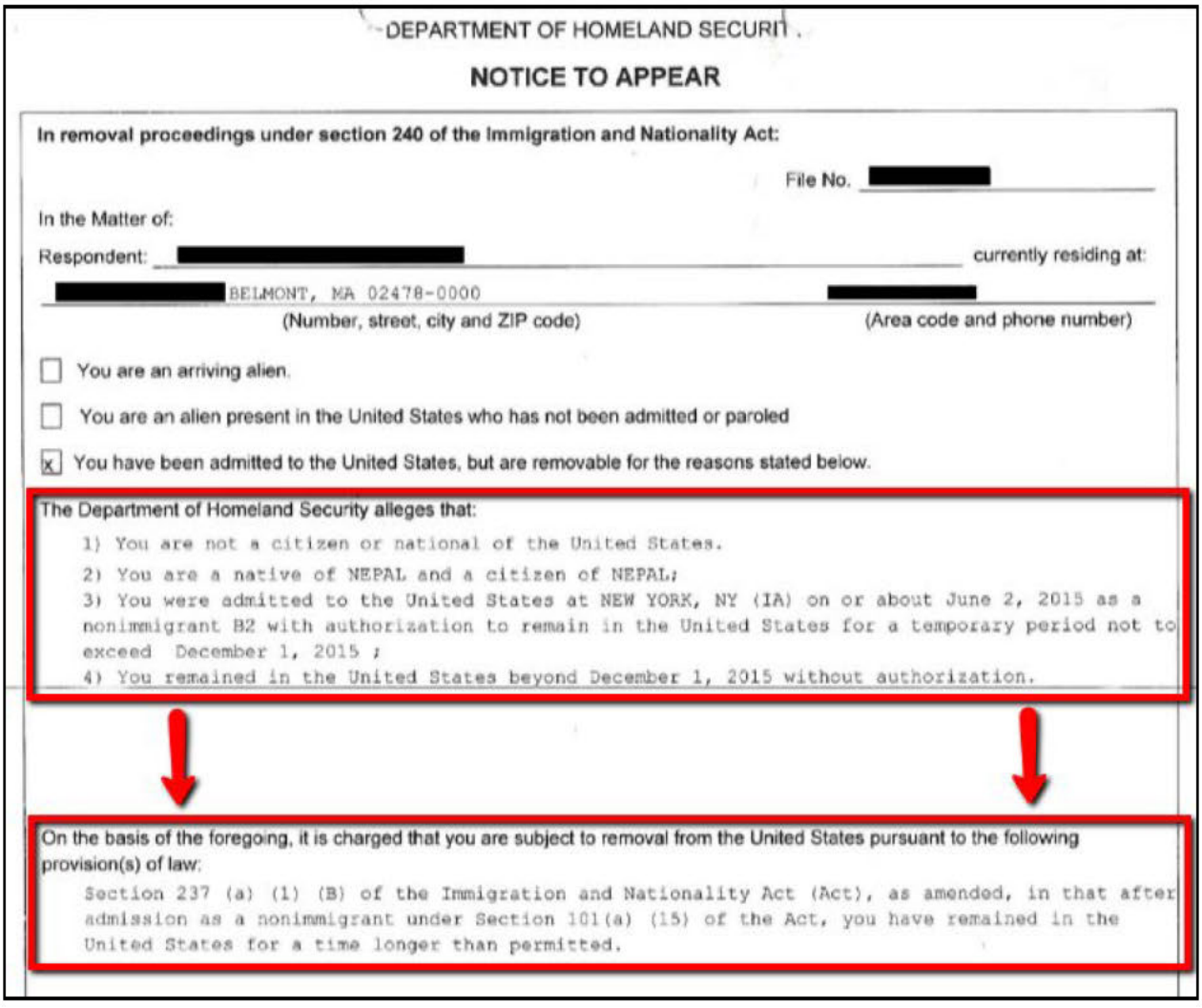


Today, many visitors to the United States do not have a visitor visa. They enter under a program called the Visa Waiver Program (VWP), pursuant to section 217 of the Immigration and Nationality Act. This allows citizens from certain designated countries to travel to the United States for up to 90 days. They must register for an advance security clearance. When they arrive, they receive a stamp in their passport. This may state "WT." They are NOT eligible for removal proceedings, but may be placed in asylum only proceedings.

C. Reference in the Notice to Appear (NTA)

The NTA may reference the status that the respondent was admitted in, and the factual allegations may state the reasons why the respondent is charged with violating that status.

Example of NTA factual allegation and corresponding charge (located in the middle section of the NTA):



DEPARTMENT OF HOMELAND SECURITY

NOTICE TO APPEAR

In removal proceedings under section 240 of the Immigration and Nationality Act:

File No. [redacted]

In the Matter of:

Respondent: [redacted] currently residing at:

[redacted] BELMONT, MA 02478-0000 [redacted]

(Number, street, city and ZIP code) (Area code and phone number)

☐ You are an arriving alien.

☐ You are an alien present in the United States who has not been admitted or paroled

☒ You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that:

1) You are not a citizen or national of the United States.
2) You are a native of NEPAL and a citizen of NEPAL;
3) You were admitted to the United States at NEW YORK, NY (IA) on or about June 2, 2015 as a nonimmigrant B2 with authorization to remain in the United States for a temporary period not to exceed December 1, 2015 ;
4) You remained in the United States beyond December 1, 2015 without authorization.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237 (a) (1) (B) of the Immigration and Nationality Act (Act), as amended, in that after admission as a nonimmigrant under Section 101(a) (15) of the Act, you have remained in the United States for a time longer than permitted.

III. Removability

Remember, most removal proceedings have two phases: (1) removability and (2) relief.

The Immigration Judge will need to determine if the respondent is removable as charged and if he or she is eligible for relief.

If removability is not established, the Immigration Judge should terminate the removal proceedings. If removability is established, the Immigration Judge should proceed to the relief phase of the hearing.

A. The Notice to Appear (NTA)

The NTA should contain factual allegations that support the charge and state the specific section of the Immigration and Nationality Act (INA) under which the respondent is charged.

If the NTA is defective or contains an error, this should be addressed before moving to the relief phase of the hearing.

The determination of removability is generally made at the outset of proceedings, often at a master calendar hearing. Sometimes, the respondent may concede removability in order to move on to the relief phase of the proceeding. Other times, he or she may contest removability and the Immigration Judge will need to decide if the respondent is removable as charged.

The NTA must always include an allegation of alienage because if the respondent is not an "alien," then the Immigration Court does not have jurisdiction over him or her. An "alien" is defined as "any person who is not a citizen or national of the United States." INA § 101(a)(3). The term "national of the United States" is defined as "a citizen of the United States," or "a person who, though not a citizen of the United States, owes permanent allegiance to the United States." INA § 101(a)(22).[3] Note that this definition appears in section 101 of the Immigration and Nationality Act. Section 101 contains many helpful definitions of recurring terms such as "admission," as discussed above.

Some common charges are:

- INA § 212(a)(6)(A)(i)-present without admission or parole
- INA § 212(a)(7)(A)(i)-immigrant not in possession of a valid immigrant document
- INA § 237(a)(1)(B)-person admitted as a nonimmigrant who is present in violation of that status (e.g. remained longer than permitted)
- INA § 237(a)(2)(B)-person convicted of a controlled substance offense

The Immigration Judge should look closely at the factual allegations in the NTA to be sure that they support the charge.

Examples of common charges and related allegations, as listed in the NTA:

[3]An example of a national of the United States, who is not also a citizen, is a person born in an unincorporated territory of the United States, such as American Samoa.

The Department of Homeland Security alleges that:

1) You are not a citizen or national of the United States.
2) You are a native of NEPAL and a citizen of NEPAL.
3) You entered the United States at an unknown place on September 24, 2017, and did not possess or present a valid immigrant visa, entry permit, border crossing identification card, or other valid entry document, and was not admitted or paroled after inspection by an immigration officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (Act), as amended, as an immigrant who at the time of application for admission, is not in the possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, or who is not in possession of a valid unexpired passport, or other suitable document, or identity and nationality document if such document is required by regulations issued by the Attorney General pursuant to Section 211(a) of the Act.

The Department of Homeland Security alleges that:

1) You are not a citizen or national of the United States;
2) You are a native of TOGO and citizen of TOGO;
3) You were admitted to the United States at New York, New York, on June 3, 2005, as a lawful permanent resident;
4) You were, on January 13, 2017, convicted in the Androscoggin County Superior Court at Auburn, Maine for the offense of unlawful possession of scheduled drugs, to wit: Heroin, in violation of 17-A Maine Revised Statutes, Annotated 1107A(1)B(1).

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as amended, in that you, after admission have been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

The Department of Homeland Security alleges that:

1) You are not a citizen or national of the United States;
2) You are a native of MEXICO and citizen of MEXICO;
3) You arrived in the United States at or near an unknown place and unknown date;
4) You were not admitted or paroled after inspection by an Immigration Officer.

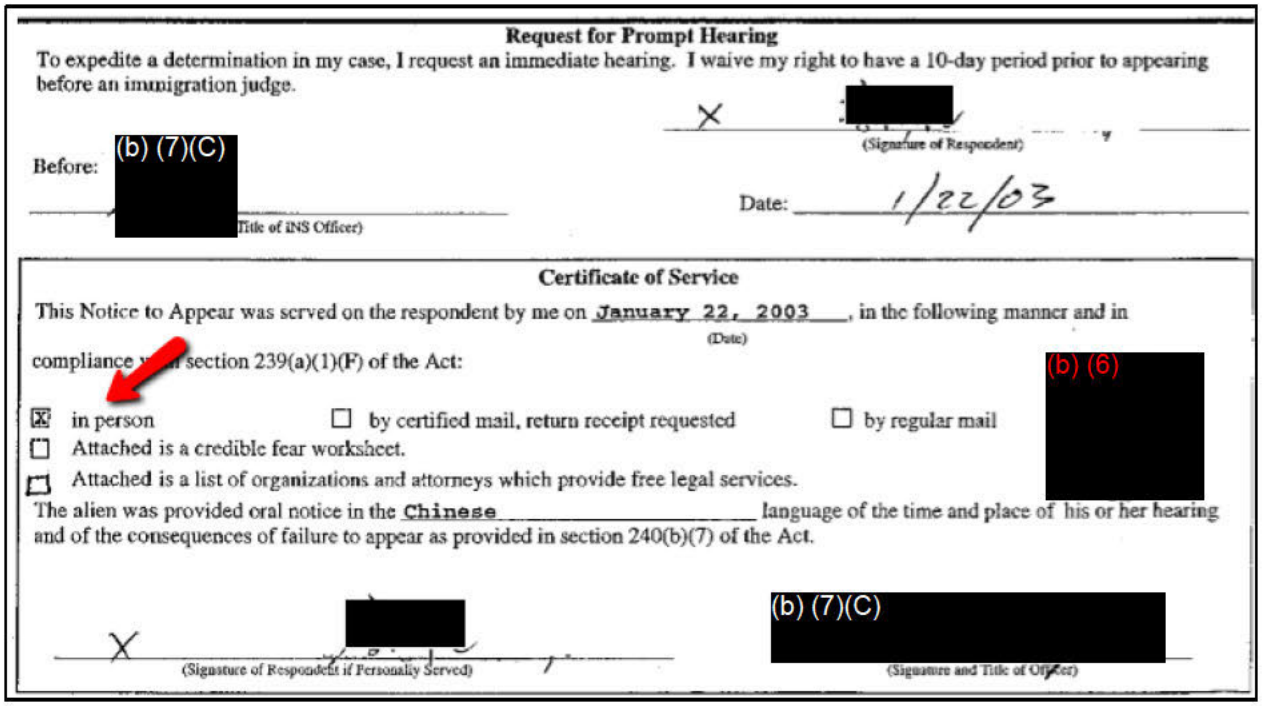
On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

B. Service

Removability also involves determining if the respondent has been properly charged and advised of his or her rights. For jurisdiction to vest with the Immigration Court, the respondent must be properly served. The method of service will be indicted on the back side of the Notice to Appear (NTA).

Example of NTA served on the respondent in person (located on the lower back section of the NTA):



Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

X [redacted]
(Signature of Respondent)

Before: (b) (7)(C) [redacted]
(Title of INS Officer)

Date: 1/22/03

Certificate of Service

This Notice to Appear was served on the respondent by me on January 22, 2003, in the following manner and in compliance with section 239(a)(1)(F) of the Act:

(b) (6) [redacted]

☒ in person ☐ by certified mail, return receipt requested ☐ by regular mail

☐ Attached is a credible fear worksheet.

☐ Attached is a list of organizations and attorneys which provide free legal services.

The alien was provided oral notice in the Chinese language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

X [redacted]
(Signature of Respondent if Personally Served)

(b) (7)(C) [redacted]
(Signature and Title of Officer)

Example of NTA served on the respondent by regular mail (located on the lower back section of the NTA):

Request for Prompt Hearing

To expedite a determination in my case, I request this Notice to Appear be filed with the Executive Office of Immigration Review as soon as possible. I waive my right to a 10-day period prior to appearing before an immigration judge and request my hearing be scheduled.

Before:

(Signature of Respondent)

(Signature and Title of Immigration Officer)

Date:

Certificate of Service

This Notice To Appear was served on the respondent by me on DEC 14 2016 in the following manner and in compliance with section 239(a)(1) of the Act.

☐ In person ☐ by certified mail, returned receipt # _____ requested ☒ by regular mail

☐ Attached is a credible fear worksheet.

☐ Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the _____ language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

(b) (7)(C) [redacted]

(Signature of Respondent if Personally Served)

(Signature and Title of Officer)

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When a respondent is represented by counsel, they may concede service, as well as a number of other issues, such as whether the respondent was properly named, waive a formal reading of the charges, etc. If the respondent is not represented, the Immigration Judge will need to make sure that the respondent is advised of his or her rights and understands the charges.

C. Date and Time of Proceedings

PLEASE NOTE: On June 21, 2018, the Supreme Court issued the decision *Pereira v. Sessions*, holding that "a putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under U.S.C. § 1229(a) [INA § 239(a)],' and so does not trigger the stop-time rule." *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). *Pereira* dealt specifically with the stop-time rule in INA § 240A(d)(1)(A), as applied to applications for cancellation of removal. However, *Pereira* raised the question about whether the Immigration Court had jurisdiction where an NTA does not include the time and place.

On August 31, 2018, the Board resolved the issue, holding that a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings so long as a notice of hearing specifying this information is later sent to the alien. *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018).

D. Pleadings

Written pleadings are helpful because they serve as an outline for the issues that an Immigration Judge may need to cover during a master calendar hearing, and they also help to memorialize key information for later reference. Written pleadings list the issues that the Immigration Judge will want to discuss before proceeding to the relief phase of the hearing. Sample written pleadings are included in the Immigration Court Practice Manual in Appendix L, as is a sample oral pleadings in Appendix M.

[Continued on next page]

Example of Written Pleading Form:

United States Department of Justice
Executive Office for Immigration Review
Immigration Court

In the Matter of: _____ File No: A - _____

In Removal Proceedings

RESPONDENT'S WRITTEN PLEADING

On behalf of my client, I make the following representations:

1. The respondent concedes proper service of the Notice to Appear, dated _____.

2. I have explained to the respondent(through an interpreter, if necessary):

   a. the rights set forth in 8 C.F.R. § 1240.10(a);
   b. the consequences of failing to appear in court as set forth in INA § 240(b)(5);
   c. the limitation on discretionary relief for failure to appear set forth in INA § 240(b)(7);
   d. the consequences of knowingly filing or making a frivolous application as set forth in INA § 208(d)(6);
   e. the requirement to notify the court within five days of any change of address or telephone number, using Form EOIR-33/IC pursuant to 8 C.F.R. § 1003.15(d).

3. The respondent concedes the following allegation(s)_____, and denies the following allegation(s)_____.

4. The respondent concedes the following charge(s) of removability _____, and denies the following charge(s) of removability _____.

5. In the event of removal, the respondent:

   ❑ names_____as the country to which removal should be directed:
   OR
   ❑ declines to designate a country of removal.

6. The respondent will be applying for the following forms of relief from removal:

   ❑ Termination of Proceedings
   ❑ Asylum
   ❑ Withholding of Removal(Restriction on Removal)
   ❑ Adjustment of Status
   ❑ Cancellation of Removal pursuant to INA § _____
   ❑ Waiver of Inadmissibility pursuant to INA § _____
   ❑ Voluntary Departure
   ❑ Other(specify)_____
   ❑ None

7. The respondent estimates that _____ hours will be required for the respondent to present the case.

8. ❑ It is requested that the Immigration Court order an interpreter proficient in the _____ language, _____ dialect;

   OR

   ❑ The respondent speaks English and does not require the services of an interpreter.

_____ _____
Date Attorney or Representative for the Respondent

11-24-08

IV. Consequences of "Arriving Alien" Charge

If a respondent is charged as an "arriving alien," this will impact the case in many ways. For example:

- An Immigration Judge does not have the authority to consider a bond request for an arriving alien. *Matter of Oseiwusu*, 22 I&N Dec. 19 (BIA 1998);
- An arriving alien is NOT eligible for voluntary departure (unless they are in the United States for one year before Notice to Appear is served). *See* INA § 240B(b)(1)(A). However, they may be allowed to withdraw their application for admission. *See* 8 CFR § 1240.1(d);
- An arriving alien who seeks adjustment of status must apply with U.S. Citizenship and Immigration Services (USCIS). The Immigration Judge does not have jurisdiction over applications for adjustment of status for arriving aliens, except under the limited exceptions described in 8 CFR § 1245.2(a)(1)(ii).

If the respondent is a lawful permanent resident (LPR), he or she can only be charged as an "arriving alien" in one of the exceptions listed in section 101(a)(13)(C) of the Immigration and Nationality Act (abandoned or relinquished that status; been absent from the United States for a continuous period in excess of 180 days; engaged in illegal activity after having departed the United States; departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings and extradition proceedings; committed an offense identified in INA § 212(a)(2), unless since such offense the alien has been granted relief under INA § 212(h) or INA § 240A(a); or is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer). Otherwise, an LPR should be charged under section 237 of the Immigration and Nationality Act. *See Matter of Pena*, 26 I&N Dec. 613 (BIA 2015); *but see Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007) (holding that abrogation of the *Fleuti* doctrine by section 101(a)(13)(C) of the Immigration and Nationality Act cannot be applied retroactively to a pre-IIRIRA guilty plea).

An LPR, who is essentially charged with having abandoned his or her residence will be charged as an arriving alien under section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act. If the Immigration Judge finds that the respondent did not abandon his or her permanent residence, then the Immigration Judge will terminate the case and admit the respondent as a permanent resident.

An LPR who is charged as an arriving alien, may be eligible for a stand-alone 212(h) waiver (without having to apply for that waiver in conjunction with a new application for adjustment of status). *See Matter of Chavez-Alvarez*, 26 I&N Dec. 274 (BIA 2014).